IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)
	)
v.	)
	)
MARVIN A. DAVIS, JR.	)
	)
I.D. NO. 0506003825	)

AMENDED
ORDER ON DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNTS 1, 2 AND 3

Defendant has moved for Judgment of Acquittal as to the three charges (Counts 1, 2 and 3 of the Indictment) relative to Marlene Davis. Those charges allege acts committed in 1994, when Marlene Davis was under 18 years of age. The indictment concerning these charges was filed on October 3, 2005. Defendant's position is that the prosecution of those offenses is time barred.

The consideration of this issue revolves around 11 *Del. C.* §205, and the interworkings of its subpart. Without further statutory modification, §205(b) would bar such charges, since: "A prosecution for any felony...or any attempt to commit said crimes, must be commenced within 5 years after it is committed."[1] That, of course, did not occur herein. There is, though, further statutory modification. The "original" (for purposes of this discussion) subsection (e) provided that a prosecution for, inter alia, the offenses charged herein could be commenced within 2 years of its initial

[1] A prosecution is commenced when "an indictment is found or an information is filed." 11 *Del. C.* §205(g).

disclosure under stated circumstances, all of which exist in this case, if the §205(b) period had expired.

Accordingly, undisputedly, all conditions appeared to have been met for the timely prosecution of these charges.

Defendant points out, however, that §205(j) creates a modification of the modification, so to speak. That subpart requires that, in order to avail itself of the §205(e) savings provisions, "the State must allege and prove the applicability of subsection...(e)...as an element of the offense." Since the indictment is the allegation, and since the indictment did not refer in any way to subsection (e), the defense argues that the time limitation of §205(b) applies, thereby precluding prosecution of these three charges. Under that "original" subsection, Defendant's position would be correct.

This issue has been addressed previously by this Court. In State v. Fink,[2] Judge Vaughn confronted that situation. Fink was a felony theft matter, in which the asserted extension beyond 5 years was provided by 11 *Del. C*. §205(c), rather than §205(e), as here. Nevertheless, the issue there, as here, was the application of 11 *Del. C*. §205(j).

As was noted there, the sought-after extension was not alleged in the indictment. Admittedly, here as in Fink, this indictment shortcoming was not raised prior to trial. Criminal Rule 12 (b)(2) states that a defense based upon a "defect in the indictment" is waived unless it is raised prior to trial.

The Court in Fink, however, held that the omission of any reference to the extension provision is not a "defect". Rather, it is a failure to invoke the applicability of the extension, thereby establishing the effectiveness of the 5 year

---

[2] Del. Super., 820 A 2d. 374(2002).

limitation period once that time provision is raised.

Indeed, Fink goes on to hold that, even if the indictment failure were to be viewed as a "defect", it would not constitute a Rule 12 waiver, because the waiver provisions of Criminal Rule 12, by the express terms of that Rule, do not "affect the provisions of ANY statute relating to periods of limitations." (Emphasis added.) Thus, 11 *Del. C.* §205 time limitations "confer substantive rights which a defendant may not waive."[3] Accordingly, this objection based upon the statutory time limitation would be preserved. It can be raised for the first time at trial, specifically, as was done here, at the close of the State's case.

"Original" §205(e), however, was completely supplanted by its 2003 amendment. The provision in effect as to each of the instant charges states: "Notwithstanding the period prescribed by subsection (b) of this section, a prosecution for...[these crimes]...may be commenced at any time...and to the extent consistent with this subsection, it shall revive causes of action that would otherwise be barred by this section." (Emphasis added). Does that have any bearing on the allegation requirements of §205(j)?

Defendant argues that it does not. Notably §205(j) was not coincidentally amended to delete its reference to and inclusion of (e). Thus, the argument goes, while the prosecution now has an unlimited extension, rather than a "discovery plus 2 years" extension, the operation of §205(j), pursuant to the reasoning of Fink, requires that indictment allegation of the §205(e) applicability.

Amended §205(e), though, does not simply alter the time extension. Rather than describing an effect "if the period prescribed by subsection (b) has expired," the amendment states that, as to these crimes, §205(b) is simply not applicable

---

[3] Cane v. State, Del. Supr., 560 A. 2d. 1063(1989).

("notwithstanding the period prescribed by subsection (b)...").

Defendant counters by pointing out that, while most of the "savings subsections ((c), (d), original (e) and (i)) refer to an extension of §205(b), the language of subsection (h) directly states that, relative to the circumstances it addresses, "the period of limitation does not run; and yet subsection (j) still applies to require indictment allegation. That point is well taken.

Nevertheless, amended §205(e) goes on. First, it states that, for these circumstances, the time bar does not merely fail to run. Instead, the §205(b) time does not apply, as mentioned previously. The crux of this statute is that, for the specified crimes, prosecution may be commenced at any time. That point is further emphasized by the amendment's conclusion that "it shall revive causes of action that would otherwise be barred by this section."

Given, however, the unamended inclusion of subsection (e) in §205(j), a disharmony arguably exists between the provisions of present §205. As is set forth in 11 *Del. C.* §203, though, the principles of statutory construction, by law, require that: "The general rule that a penal statute is to be strictly construed does not apply to this Criminal Code, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the purposes of the law...[which means – §201]...to give fair warning of the nature of the conduct prescribed.

The clear import of §205(e) as amended is to exclude the delineated sexual offenses from the workings any time prescription.

Accordingly, by virtue of 11 *Del. C.* §205(e) as amended, the State's prosecution of the within offenses, under the allegations of the extent indictments, is timely.

A separate issue was presented to the Court by Motion of the State. That is: In the event that the present indictment as to these three counts does fail because of the workings of 11 *Del. C.* §205(j), can the State move to amend the indictment after it has rested?

Defendant argues that such an amendment is not possible, because §205(j) refers to allegation requirements as to subsection references "as an element of the offense." Further, pursuant to Fink, the limitations period is substantive, rather than procedural.

Because of the foregoing analysis, this question is moot. Nevertheless, it should be noted that the limitation period, while substantive and as an element, is not an element of these charges. The elements are contained in 11 *Del. C.* §768. In that context, Superior Court Rule 7(e) indicates that an amendment to an indictment may be made "at any time before verdict" (which was accomplished by the State's motion), so long as "substantial rights of the defendant are not prejudiced."

The Court finds no prejudice to Defendant by such an amendment. At the very latest, Defendant and his counsel were fully aware more than 10 weeks prior to trial that charges concerning alleged crimes against the person of Marlene Davis were being prosecuted. The amendment offered changes nothing from the standpoint of what Defendant needs to confront. While §205(j) and Fink state the substantive or elemental nature of a specified time allegation, it is not anything that the Defendant need confront or prepare for. Hence, no prejudice exists in an amendment to the indictment. As to the §205(j) companion requirement to prove the applicability of subsection (e), the State provided that in the course of its case in chief by demonstrating that all of the elements of 11 *Del. C.* §768 existed, including the pre-existing requirement that the prosecution commenced within 2 years of its having

been reported. As to the amended (e), there appears to be nothing "to prove," further underscoring the inapplicability of §205(j) to subsection (e), as amended.

Accordingly, were it necessary, the State's Motion to Amend the indictment would have been granted.

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal is DENIED.

SO ORDERED this 10th day of February, 2006.

/s/ Robert B. Young
JUDGE

RBY/sal
oc: Prothonotary
cc: Counsel